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No. 91-469

In The

Supreme Court of the United States

October Term, 1991

PARAGOULD CABLEVISION, INC.,

Petitioner,

vs.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF PARAGOULD

ROBERT F. THOMPSON
BRANCH, THOMPSON & PHILHOURS
A Professional Association
Attorneys for Respondent
City of Paragould
414 West Court Street
Paragould, Arkansas 72450
(501) 239-9581

1127
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STATEMENT OF THE CASE

For many years prior to this litigation, the petitioner operated, as a monopolist, a cable television service in Paragould, Arkansas. This operation has been pursuant to Franchise Agreements the

last of which was a non-exclusive Franchise Agreement negotiated and executed by the parties on November 28, 1983.

Because of extensive and widespread dissatisfaction with the operation of the cable television system and the resulting pressure from the citizens, the Paragould City Council passed Resolution 86-3 calling a special election on the question of authorizing the Paragould Light and Water Commission to construct and operate a municipal cable television system. At the special election, on June 17, 1986, 79% of the voters approved the measure.

The City Council subsequently called a special election on the question of the issuance of 3.2 million dollars of capital improvement bonds for the construction of the municipal cable television system. These bonds were secured by a property tax feature within their terms. Even after an extremely negative campaign by the petitioner, the measure passed, and the City set on its agenda for January 22, 1989; the consideration of the passage of an ordinance for the issuance of the capital improvement bonds.

On January 18, 1989, in a clear effort to frustrate the marketing of the City's capital improvement bonds, the petitioner began filing its lawsuits.

In the first action, the petitioner attempted to enjoin the issuance of the capital improvement bonds that would enable the City to acquire its system. It was unsuccessful. *Paragould Cablevision, Inc. v. City of Paragould*, 305 Ark. 476 (1991). A second state lawsuit was filed and just recently withdrawn by the petitioner.

The present litigation was filed on January 29, 1989, before the construction of the City cable system was begun. The allegations were couched in terms of "information and belief"

and other speculatory allegations. Both the United States District Court and the Eighth Circuit Court of Appeals expressed skepticism as to the existence of even a justiciable issue.

The petitioner began this litigation by attempting to prevent the City from entering the market place, specifically asking the District Court to "permanently enjoin from construction and operation a cable television system." However, for the purpose of this petition for certiorari, Cablevision now takes an opposite position stating:

> Cablevision does not contend that the decision of the City and CLW to enter to the cable television business violates the anti-trust laws.

(Petition, p. 14).

Cablevision will apparently change its position and say virtually anything that it perceives will accomplish its objectives.

All of the pleadings and briefs of the petitioner in the various cases have been couched in terms of the most outrageous allegations. That pattern continues in this petition. The petitioner alleges that the City is involved in renegade behavior which is simply not true.

The petitioner also alleges that if it is not permitted to proceed with this litigation the community will have no local speaker. Cablevision does not tell the Court that Paragould is served by a city newspaper, a regional newspaper, and two newspapers of state-wide circulation. Paragould has two licensed radio stations, and separate and apart from any cable system, the City is served by a regional television station less than 18 miles from its corporate limits. The factual allegations of the petitioner are specious and totally unmeritorious.

Since January of 1989, it has become apparent that the petitioner has utilized litigation as a weapon in its attempt to prevent the City from the implementation of Arkansas Act 328 of 1987. Further, as opposed to a forum to resolve legitimate disputes, the petitioner has, as monopolist, attempted to utilize the Sherman Act in a perverse manner to frustrate or cripple the City as a competitor.

SUMMARY OF ARGUMENT

The petitioner began this litigation by asking the District Court to enjoin the construction and operation of the Paragould television cable system. Having failed to foreclose Paragould's market entry, it now denies it ever contended otherwise. Cablevision now argues that the Court of Appeals misconstrued the intent of the Arkansas Legislature in the passage of Act 328 of 1987.

The Court of Appeals, however, reviewed Act 328 of 1987 and correctly found that the application of the act necessarily results in the displacement of competition. Its further application of *Parker v. Brown* and its progeny makes finding for the respondents apparent.

The petitioner's First Amendment assertions presuppose the application of an unlawful "media tax." The contractual provisions that give rise to this argument are not tax questions and do not have the effect of regulating speech of any kind. Nor do these contractual provisions constitute a deliberate or calculated device to penalize the petitioner. Assertions of waiver by the petitioner are not supported by a constitutional issue.

REASONS FOR DENYING THE WRIT

I.

The respondent City is immune from federal anti-trust liability because the foreseeable result of the implementation of Act 328 of 1987 will restrict competition.

The petition for writ of certiorari fails to demonstrate any basis for the Supreme Court to reverse its long line of authority establishing the concept of state action immunity.

As the Court of Appeals noted, the law applicable in this case results from a series of cases culminating in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In that case, the Supreme Court determined that if a municipality is engaged in an activity pursuant to clearly expressed state policy, it enjoys the protection of state action immunity. The Supreme Court has also made it clear that a specified and detailed legislative authorization of monopoly need not exist to establish the necessary state intent. *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978). This line of authority has been followed consistently in the Eighth Circuit. *Scott v. City of Sioux City*, 736 F.2d 1207 (1984), *cert. denied*, 471 U.S. 1003 (1985); *Golden Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (1983) and *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517 (1985).

Based upon this authority, municipalities are immune from anti-trust liability where restriction of competition is a foreseeable result of implementing that action authorized by state law. It then becomes a simple matter to determine whether restriction of competition is a foreseeable result from the application of Arkansas Act 328 of 1987. The relevant statutes provide as follows:

A.C.A. 14-199-601. Authority of municipalities generally — Nonliable.

(a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting, end distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

(b) In no case shall a city of town be held liable for damages Ark. Code Ann. § 14-199-601 (Supp. 1989).

A.C.A. 14-199-602. Appliances, fixtures, and equipment authorized.

The city or town may erect, construct, operate, repair, and maintain in, upon, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guywires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with television signal distribution system.

See also, Ark. Code Ann. §§ 14-199-303 & 309 (1987), which authorize municipalities to issue capital improvement bonds.

The District Court described the terms of the above grant of authority as broad, sweeping and comprehensive.

The Court of Appeals agreed pointing out the following:.

> Arkansas has clearly authorized municipalities to enter into the cable television business. . . . Municipalities generally enjoy access to extant governmental infrastructure such as utility poles and rights of way. When a municipality, such as Paragould or its entity, the CLW, enters into the cable market, it necessarily will benefit from this access. Thus, by virtue of their status, Paragould and the CLW do not have to build their cable television operations from scratch. Presumably, rent-free office space is available, employees and "executives" are already hired and presently serving in other capacities, trucks and equipment to service cable needs are available, demographic information has been compiled and computerized, rights of way have been secured for other purposes, and utility poles are already standing. If the Arkansas legislature did not intend the utilization of these resources and the resultant benefit of being able to supply cable services with diminished overhead costs, it would have tailored the enabling statutes accordingly. Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorized municipalities to enter into an industry with monopolistic tendencies.

The petitioner has never offered at any stage in this process any reasonable argument to the contrary. There are other considerations to determine the legislative intent.

Prior to 1971, the State of Arkansas was a traditional Dillon Rule state, and therefore, Arkansas municipalities had no inherent

power except that given by the state or necessarily implied from expressed powers. In 1971, that changed, however, and the Arkansas Legislature passed legislation commonly referred to as the Arkansas Home Rule Statute. Ark. Code Ann. § 14-43-602. It provides as follows:

> Any city of the first class is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs including, but not limited to, the power to tax.

In the 1971 Session of the Arkansas Legislature, the public policy regarding the authority of local governments to address the needs of their citizens was specifically addressed. Act 266 of 1971 provided as follows:

> Where it is found and declared that numerous and pressing needs of Arkansas municipalities are, because of their urgency, creating burdens on the General Assembly due to the requirements that the General Assembly examine each individual problem and authorize each specific power to municipalities, according to the provisions of the so called Dillon Rule, which requires an express grant of authority to a municipality by the General Assembly, and which Rule is now considered obsolete and should be repealed immediately . . .

If there was any doubt as to the announced public policy of the State Legislature from that point forward, it was laid to rest by the passage of Act 537 of 1971 which specifically provided as follows:

> It is hereby found and determined by the General Assembly that Act 266 of 1971 was intended to

> grant broad authority to cities of the first class to exercise functions or legislative powers pertained to the local municipal affairs of the city . . .

After 1971, it is readily apparent from an examination of Act 266 of 1971 that the City of Paragould, Arkansas, could have created its cable system without the benefit of any specific legislation or specific state policy such as Act 328 of 1987. Therefore, until Act 328, the State of Arkansas was "neutral" as concerns the providing of this particular public service. By the passage of Act 328 of 1987 and Act 28 of 1988, the State of Arkansas abandoned its "neutrality" and by broad and sweeping language specifically authorized cities such as Paragould to offer cable television service. A cursory examination of that Act demonstrates the extent of the grant of authority. It even permits municipalities to exceed a distance of two miles outside its boundary to provide that service, and it insulates them from liability for damages.

The clear intent of the Arkansas Legislature was to enable cities of the first class such as Paragould to provide this service for its citizens, and the necessary result of providing this authority, as the Court of Appeals has stated, has the effect of displacing competition. It seems, therefore, to this respondent that unless the Supreme Court is in a position to reverse its long standing position that cities are immune from anti-trust liability where the restriction of competition is a foreseeable result of implementing state law, this petition for certiorari has no merit. The petitioner should be left to those state remedies available, and the Sherman Act simply has no application.

II.

Assertions of waiver by the petition are not supported by a constitutional issue.

As regards Cablevision's constitutional allegation, the petition for certiorari is substantially different from the relief sought in its complaint.

On November 28, 1983, the petitioner negotiated with the City of Paragould, Arkansas, a non-exclusive Franchise Agreement. As a part of that contract, the parties negotiated the following agreement in paragraph 2.4:

> This Agreement does not cover major technical advances in TV reception and use, in cable TV or TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of Grantee such as advertising over Grantee's cable TV system. If Grantee should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities and the proposed modification shall be subject to negotiation. The parties recognize that services involving use of such advanced technology must be offered by others (e.g. the telephone company) and that the offering of such services may not require a franchise agreement or a Modification of this Agreement. The parties also recognize that

> such advanced technology may make cable TV as contemplated by this Agreement obsolete or virtually certain to be unprofitable to the operator. Upon the practical advent of any such technical advance, either party may propose that this Agreement be opened for further negotiation and modification so that each party may better protect its interests.

The non-exclusive Franchise Agreement also provided in Paragraph 5.10 that the cable operator would pay a 3% franchise fee on gross receipts.

In its complaint, the petitioner suggests that it desires to advertise and that the City has taken the position that the revenues generated from advertisement should be included in the franchise fee calculation. The City's position, therefore, constitutes a "media tax" in violation of the First Amendment.

The District Court found no merit in this allegation and described it variously as nonexistent, frivolous, end lacking jurisdiction. The court found that the purpose of Section 2.4 was to anticipate contractual contingencies for the protection of the parties, and that the covenant did not outlaw or curb advertisement within the meaning of the First Amendment. The court stated as follows:

> At most it could be characterized as a mechanism for mutual regulation of an agreement which infringes on speech rights to the same extent as it prevents the advent of technological changes in Paragould; that is to say, not at all. In short, this provision is contractual in nature and does not seek, nor have the effect of regulating speech of any kind.

> Contractual modifications do not automatically become tax questions merely because one party is a political subdivision with taxing authority and, as found above, the provisions of 2.4 do not inhibit speech.

The Eighth Circuit Court of Appeals accepted the District Court's analysis and agreed that the provision was contractual in nature.

As concerns the allegation of a "discriminatory media tax," the District Court pointed out that Paragould has not extracted any sort of advertising fee nor has Cablevision submitted any convincing evidence to support the imminency of such a fee. Therefore, a justiciable controversy was lacking. The Court of Appeals added the following to this observation:

> Cablevision voluntarily entered into the Franchise Agreement presumably for its own economic gain. The forum for protecting its free speech rights was the bargaining table, not the courtroom seven years later.

The petitioner has changed its allegation in preparing this petition. It no longer alleges the application of the franchise fee to advertising revenue being a media tax. The respondent suspects that the reason the petitioner now has abandoned this position is because of the impact of *Leathers v. Medlock*, 111 S. Ct. Rep. 1438 (1991). The thrust of that case is that in order to be actionable the "media tax" must resemble a penalty for particular ideas or speakers, or must discriminate based on ideas. It must in effect be a deliberate and calculated device to penalize a claimant.

Before the analysis can ever reach the stage of a waiver as asserted by the petitioner, there must be the underlying assumption

that there was a discriminatory tax in existence. The petitioner brushes over this requirement and assumes away the critical consideration.

Section 2.4 of the non-exclusive Franchise Agreement entered into in 1983 simply cannot reasonably be interpreted to be a deliberate and calculated device to penalize the petitioner.

It should also be noted that the Federal Cable Act provides that a franchise fee can be figured on the "cable operators' gross revenue derived . . . from the operation of the cable system." 47 U.S.C.S. § 542(b). By this broad language, the Congress apparently intended that not only advertising revenue but all revenue derived from the operation of a system is subject to the application of the 5% franchise fee. Therefore, to grant this petition and reverse the Court of Appeals on this question would have the effect of grafting a case law exception for advertising revenue to the "gross revenue derived" language in the Federal Cable Act.

As found by the District Court and the Court of Appeals, the petitioner's constitutional claims are meritless, premature, frivolous, and lacking in a justicible controversy.

CONCLUSION

It is apparent from a reading of the opinion of the Eighth Circuit Court of Appeals that the issues addressed by the opinion are straightforward and appropriately considered by the court and do not constitute sufficient importance for this Court to entertain the petitioner's writ of certiorari.

Respectfully submitted,

ROBERT F. THOMPSON
BRANCH, THOMPSON &
PHILHOURS
Attorneys for Respondent
City of Paragould